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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR LAJUANE TAYLOR

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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I. THE GOVERNMENT'S PROPOSED DEFINITION IS OVERBROAD.

The Government's proposed definition for the term "burglary" in 18 U.S.C. § 924(e) is overbroad, and certain to subject to enhancement persons convicted of burglaries not involving a serious, or even significant, potential risk of physical injury to others. As such, its definition offends the statutory language, principles of fairness and process and Congressional intent.

A. IT IS UNCLEAR HOW THE GOVERNMENT PURPORTS TO DEFINE THE TERM "BURGLARY."

At the threshold, it is unclear specifically how the Government purports to define the term "burglary." In summarizing its argument, the Government asserts that "the modern definition of burglary, which Congress expressly incorporated in the 1984 statute, is the proper definition of the term 'burglary' in the 1986 statute." Respondent's Brief ("Res. Br.") at 8. "Burglary" was defined in the referenced statute as a "felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. (Appendix) § 1202 (1982 & Supp. II 1984) (repealed 1986).

In its argument section, however, the Government asserts: "'Burglary' under Section 924(e)(1) includes any unlawful entry into a building for the purpose of committing a crime." Res. Br. 11-12, *quoting*, *inter alia*, ALI, *Model Penal Code* § 221.1 (1985). *See also* Res. Br. at 11 (argument heading).

Finally, the Government asserts that "it is enough that the offense is burglary," Res. Br. at 33, and that "all burglaries are 'violent felonies' within the meaning of the 1986 Act." *Id.* at 34. These statements appear to embrace the holding of the Eighth Circuit in this case—that any crime labeled "burglary" can be counted as an enhancement offense under the 1986 Act, J.A. 36,—which the

Government disavowed only a few pages earlier. Res. Br. at 29-32. We will assume, except as otherwise noted,[1] that the Government stands by its earlier assertions that the repealed 1984 Act definition should apply here.[2] *See, e.g.*, Brief For The United States In Opposition To Petition For Writ Of Certiorari at 4-6.

B. THE GOVERNMENT'S DEFINITION INCLUDES WITHIN ITS AMBIT OBVIOUSLY NON-VIOLENT OFFENSES LIKE SHOPLIFTING AS SENTENCE ENHANCING PREDICATE OFFENSES.

The definition which the Government espouses undeniably includes within its sweep conduct which should not, as a matter of fairness or logic, subject perpetrators to enhancement under Section 924(e).

For instance, shoplifting literally consists of "entering . . . a building that is property of another with intent to engage in conduct constituting a Federal or State offense." Under California law, shoplifting may constitute burglary. *People* v. *Wilson*, 160 Cal. App. 2d 606, 325 P.2d 106 (1958). *See United States* v. *Chatman*, 869 F.2d 525, 529 n.2 (9th Cir. 1989).[3] Likewise, breaking and entering a vending machine located in the lobby of a building would meet the Government's test. *See, e.g.*, Colo. Rev. Stat.

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[1] As discussed at pp. 10-14 below, the Government's failure to stick with a single definition suggests that there is no ordinary, common meaning of the term "burglary."

[2] As it did in the Respondent's Brief, the Government has previously blurred the distinction between the 1984 Act definition, its "second definition," the Model Penal Code definition, and the definitions of burglary contained in state burglary statutes. *E.g.*, Brief for the United States In Opposition to Petition for Writ of Certiorari at 4. *See* pp. 10-14, below.

[3] In *Chatman*, the Government argued that burglaries of automobiles constituted predicate offenses under § 924(e). 869 F.2d at 528-29.

§ 18-4-204 (1986) (burglary includes breaking into vending machine and coin-operated telephone). Can it seriously be contended, either as a matter of Congressional intent or of fairness, that persons found guilty of shoplifting or stealing from a vending machine should be deemed to have committed a "violent felony" under the Armed Career Criminal Act? An unarmed break-in to a closed and unoccupied gas station to steal several quarts of oil would also subject a person to the drastic enhancement of Section 924(e). This scenario is not whimsical—it is apparently the offense committed by petitioner, or more accurately by those who accompanied him, in 1971, and for which he was convicted under the then-effective Missouri second degree burglary statute. J.A. 11. Should such unarmed burglaries of unoccupied commercial structures be used as enhancing offenses which are denominated as "violent felonies" and under the plain language of the statute must carry a "serious potential risk of physical injury to another"?

The answer to these question is no. In stark contrast to the Government's proposed definition, the test articulated by petitioner would ensure that only persons committing violent crimes that threaten others with physical injury will be labelled "armed career criminals" under Section 924(e). As noted below, that is what Congress intended when it enacted the 1986 legislation.

II. THE LEGISLATIVE HISTORY INDICATES THAT CONGRESS WISHED TO INCLUDE AS PREDICATE OFFENSES ONLY THOSE BURGLARIES THAT NECESSARILY PRESENT A SERIOUS RISK OF PHYSICAL INJURY TO OTHERS.

The Government simply cannot avoid the fact that its proposed definition was *deleted* from the 1986 Act. The Government suggests, without citation, that this highly significant definitional section was merely "overlooked" by Congress. Res. Br. at 27. The Government's surmise is

directly contrary to the presumption that the deletion of limiting language contained in an early version of a bill is intentional. *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983).[4]

The Government's arguments on the issue of legislative history are unpersuasive. It first notes that the definition of burglary contained in the 1984 Act "was inserted in response to suggestions that it was necessary to avoid the risk that the term would be read restrictively and confined to common law burglary." Res. Br. at 19. However, petitioner does not contend and has never contended that the common law definition of burglary is the definition of first choice here.[5]

The Government also contends that the 1986 Act amendments were intended to "expand the scope of the Armed Career Criminal Act." Res. Br. at 22. This assertion begs the question presented in this case. The idea of "expanding" predicate offenses is important only insofar as it indicates the addition of other violent crimes like murder, rape, kidnapping and assault. It is certainly possible to "broaden" the number of predicate offenses (as the 1986 Act assuredly did) while at the same time correcting the definition of a given offense. Thus, although the 1986 Act expanded the potential enhancing offenses from "burglary" and "robbery" to "serious drug offenses" and "violent felonies," it also contracted the definition of burglary to ensure that only those which were "violent" would constitute enhancing, predicate offenses. This is evi-

[4] The Government fails to cite or discuss *Russello* in its brief.

[5] Petitioner does, however, contend that the common law definition is superior to that urged by the Government, since the latter would necessarily subject to enhancement many more persons convicted of burglaries not involving a serious risk of injury to others. *See Brief for Petitioner* ("Pet. Br.") at 33 n.9.

denced, simply but convincingly, by the decision of Congress to employ the term "violent felony."[6]

The Government focuses heavily upon the testimony of its own Deputy Assistant Attorney General Knapp. Res. Br. at 23, 24. He testified that "the term 'crime of violence' would include robberies and burglaries, since both are felonies that by their nature involve a substantial risk that physical force against the person or property of another may be used in the course of committing them." *The Armed Career Criminal Act Amendments: Hearing on S2312 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 9 (1986) (Reporting Text of S2312) ("*Senate Hearing*"). As a mere witness at a Congressional hearing, Knapp's testimony carries little or no weight in determining Congressional intent. *Kelly* v. *Robinson*, 479 U.S. 36, 50 n.13 (1986). Moreover, all of Knapp's testimony in the Senate hearing discussed another, significantly broader predicate offense definition, "crime of violence," which included any crimes that involved violence not only to persons but also to *property*. S. 2312, 99th Cong., 2d Sess. (1986). *See Senate Hearing* at 9 (Knapp testimony). Furthermore, the Government does not even respond to petitioner's suggestion that the eventual rejection of this formulation of the definition of the predicate offense is made more significant by its inclusion elsewhere in the Armed Career Criminal Act. *See* Pet. Br. at 18.

The Government notes that the ultimately enacted, compromise version of the "violent felony" definition spe-

[6] Similarly, the statement of Representative Hughes that "[w]e have strengthened the Armed Career Criminal Act by expanding its coverage to drug crimes and violent crimes other than just burglary and robbery" does not go to the issue of the appropriate definition of the term "burglary," contrary to the Government's assertion. *See* Res. Br. at 27.

cifically included burglary, arson, extortion, and offenses involving the use of explosives, which the Government describes as property crimes. Res. Br. at 27. Respondent tacitly suggests that Congress intended that all such "property crimes" (including all burglaries, whether or not they include a serious risk of injury to persons) would constitute enhancing offenses. *Id. See also id.* at 33-34.

This argument is belied by the language of the statute itself. Nowhere is "property" mentioned in Section 924(e)(2)(B). Instead, a violent felony must have as an element "the use, attempted use, or threatened use of physical force *against the person of another,*" or be "burglary, arson, or extortion, involve[] use of explosives, or *otherwise* involve[] conduct that presents *a serious potential risk of physical injury to another.*" 18 U.S.C. § 924(e)(2)(B)(i) and (ii).

Rather than the hidden meaning imparted by the Government, the language of the statute as enacted suggests that Congress wished to recognize that burglary and the other listed offenses[7] *could*, under certain circumstances, involve a threatened use of force against another, 18

[7] The crime of arson, and crimes involving the use of explosives, tend to carry a more substantial risk of injury to persons than does burglary. In contrast, although extortion typically involves the threat of force, violence, or fear, *see, e.g.*, 18 U.S.C. § 1951(b)(2); *id.* § 875(b) and (c), some extortion statutes may only involve a threat to the property or reputation of another. *See, e.g.*, 18 U.S.C. § 875(b); *id.* § 891(b). Because extortion does not always require conduct that threatens others with physical injury, the rule espoused by petitioner —that burglaries must necessarily involve a serious risk of injury to another person to qualify as predicates—is also properly applicable to the term "extortion" as used in the 1986 Act. Significantly, there is no support for the Government's casual assertion that "the statutory language leaves no doubt that extortion of any type, including extortion by economic duress, is within the reach of Section 924(e)(2)(B)(ii)," and none is cited by the Government. *See* Res. Br. at 33.

U.S.C. § 924(e)(2)(B)(i), or present a serious potential risk of physical injury to another. 18 U.S.C. § 924(e)(2)(B)(ii). It is understandable and quite likely that Congress wished to make clear to those who would later attempt to interpret the term "violent felony" that burglary and the others were not to be disqualified as enhancing offenses *merely* because they are "crimes against property." In other words, under certain aggravated circumstances these offenses can involve the threatened or actual physical injury to a person, though they will not necessarily do so in all instances.[8]

[8] Thus, the Arkansas Supreme Court reversed a jury's consideration of a prior conviction for "burglary," without any further description of the underlying conduct, as an aggravating circumstance in a capital case. *Williams* v. *State*, 621 S.W.2d 686 (Ark. 1981). The prosecution submitted that a prior conviction for any "burglary," without more, was an aggravating circumstance under a definition which is nearly identical to Section 924(e)(2)(B). *Id.* at 687. The statute made a prior felony conviction an aggravating circumstance when it had an element "which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person." *Id. Cf.* 18 U.S.C. § 924(e)(2)(B).

In reversing, the Arkansas Supreme Court stated:

> Under the Criminal Code a person commits burglary if he enters or remains unlawfully in another person's occupiable structure with the purpose of committing therein an offense punishable by imprisonment. [Citation omitted.] Thus burglary can be committed by an unlawful entry into a vacant house, with no possibility of violence or injury to anyone. The jury had no substantial basis for finding this particular aggravating circumstance, which should not have been submitted without proper supporting proof.

621 S.W.2d at 687. Thus, the court recognized that unlawful entry into an occupiable structure did *not* necessarily create a threat of violence or substantial risk of physical injury to another person. Similarly, the inclusion of all purportedly "generic" burglaries as predicate convictions for enhancement, as the Government advocates, necessarily includes many "burglaries" which present no threat of injury to others.

Perhaps most significant is the language of House Committee members themselves:

> 1. "[It is] *not inadvertent* that we left it [burglary] out"; *Armed Career Criminal Legislation: Hearing on H.R. 4768 Before the Subcomm. on Crime on the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 26 (1986) (hereinafter "*House Hearing*");
>
> 2. "[We] will add . . . burglary . . . *where the conduct involved presents a serious risk of injury to a person*"; H.R. Rep. No. 98-849, 99th Cong., 2d Sess. 3 (1986) (hereinafter "*House Report*");
>
> 3. "[Section 924(e)(2)(B)(ii)] includes State and Federal felonies against property *that present a serious potential risk of physical injury to a person*"; *House Report* at 4;
>
> 4. "Subsection 2(B)(ii) adds all State and Federal felonies against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses *where the conduct involved presents a serious risk of injury to a person*"; *Id.* at 5.

(Emphasis supplied).

The House Committee which reported out H.R. 4885 deemed that the language of subdivision (ii) therein, *i.e.*, "involves conduct that presents a serious potential risk of physical injury to another," would include burglary and the other "property crimes" *only* where the conduct presented a serious risk of injury to a person. *House Report* at 4. Thus, after the Senate's proposed definition including all violent crimes against property was rejected, it is not surprising that the Senate had those property crimes specifically enumerated in the House definition. Their inclusion in the compromise version which eventually became law makes it clear that the enumerated offenses may also present an occasional risk of injury to *persons*, even though they are generally considered crimes against property.

For these reasons, the legislative history and governing principles of statutory interpretation both suggest that the term "violent felony" in Section 924(e)(2)(B) includes only those burglaries which involve conduct presenting a serious potential risk of physical injury to another. Indeed, the very language cited by the Government, as support for its position that the House decided to include all burglaries as a predicate offense, Res. Br. at 25, appears to support petitioner's argument that the House was distinguishing violent, dangerous burglaries from the routine non-violent burglary:

> We are talking about burglaries that probably are being *carried out by an armed criminal*, because the triggering mechanism is that they possess a weapon. So *we are not talking about the average run-of-the-mill burglar*, necessarily. . . .

House Hearing at 41 (comments of Rep. Hughes, sponsor of bill that did not include property crimes) (emphasis added).

Additionally, the plain language of the Act itself convincingly refutes the government's notion that Congress intended all burglaries to be used as predicate offenses under the Armed Career Criminal Act. According to the Act, a "violent felony" includes any crimes that "is burglary . . . or *otherwise* involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). Inclusion of the word "otherwise" is instructive with regard to Congress' intent. If the government were correct in its argument that Congress intended burglaries that do not pose a serious risk of physical injury to another person to qualify as predicate offenses, there would have been no need to include the word "otherwise" in the last phrase of subsection (ii). Instead, the relevant portion of the Act would have defined "violent felony" to include any crime that "is burglary . . . or involves conduct that presents a serious

potential risk of physical injury to another." Obviously, Congress chose not to so define the term "violent felony." The Government's proposed interpretation of subsection (ii) essentially reads the word "otherwise" out of the Act, thereby violating a fundamental principle of statutory construction that effect be given to every word in a statute. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979).

It is clear that Congress recognized that some, but not all, burglaries present a risk of physical injury to others. It is also apparent that the only categorical interpretation of the term burglary consistent with that intent is the one advanced by petitioner.[9]

III. THE GOVERNMENT'S PROPOSED DEFINITION OF THE TERM "BURGLARY" IS NOT THE "ORDINARY, CONTEMPORARY" DEFINITION OF THAT TERM.

The Government asserts that its formulation constitutes the "ordinary, contemporary definition" of the term burglary. Res. Br. at 11-12. It is also claimed that this purportedly "generic" definition is used by "an overwhelming majority of modern jurisdictions." *Id.* at 6. These statements are incorrect. Moreover, modern burglary statutes are not the only ones at issue, as evidenced by the Government's attempt to enhance based upon 18 and 26 year-old burglary convictions under a *repealed* statute.

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[9] The Government also notes that a proposal to add the purported "generic definition of burglary" to Section 924(e) is being considered by the Congress. Suffice it to say that this is not the law, and this proposal may trigger the same debate that led to the previous deletion of the 1984 Act's definition. Moreover, it is a "patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant." *See Johnson* v. *Transportation Agency*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting).

For starters, far from a single generic definition, the Government has espoused at least *two separate* definitions—the 1984 Act definition, and its own formulation, derived apparently from various sources.[10] The second definition requires only "unlawful entry," while the 1984 Act requires "entering or remaining surreptitiously." The second definition does not require that the building be that of another—the 1984 Act has such a requirement. The second definition requires that there be intent to commit a crime, while the 1984 Act definition requires "intent to engage in conduct constituting a Federal or State offense." Finally, the 1984 Act encompasses only felony burglaries, while the second definition is not so limited.[11]

These distinctions are not academic. For instance, the 1984 Act's "entering or remaining" criterion differs from the nineteen states which premise burglary solely on entry. *See*, *e.g.*, Okla. Stat. Ann. tit. 21, § 1431 (West 1983). The term "unlawful entry" (employed in the Government's second definition) differs from the laws of 27 states, which use the term "entering or remaining unlawfully."[12] For example, compare Md. Ann. Code art. 27, §§ 30-31A (1988) (breaking and entering is unlawful

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[10] To wit, "[U]nder its ordinary, contemporary definition, the term burglary means the unlawful entry of a building with the intent to commit a crime inside." Res. Br. at 11-12.

[11] Not all burglaries are felonies. *E.g.*, Tex. Penal Code Ann. § 30.03 (Vernon 1989).

[12] If the Government's "second definition" is adopted, mini-trials will be required as to convictions occurring in these 27 states to determine whether a defendant was found guilty of "entering" as opposed to "remaining." The following hypothetical situation is illustrative. A person "legally" enters a store five minutes prior to closing. He hides, and remains inside ("unlawfully") until store personnel go home. He then loots and ransacks. Under the second definition, this would not be "burglary."

and required for burglary conviction), with Mo. Rev. Stat. § 569.170 (1986) (entering or remaining unlawfully is sufficient).

Both of the Government's proposed standards are limited to burglaries of "buildings." However, many state statutes speak not only of buildings but of structures. Burglaries can occur in pay phones, watercraft, caves, and fenced commercial and residential yards. *E.g.*, Colo. Rev. Stat. § 14-4-204 (1986) (pay phone and vending machines); Ga. Code Ann. § 16-7-1 (1988) (watercraft); Ariz. Rev. Stat. Ann. § 13-506 (1989) (fenced commercial and residential yard); Neb. Rev. Stat. § 28-507 (1989) (any real estate or any improvements). These sites do not constitute "buildings." Therefore, where the purported predicate offense occurred in a state extending burglary to something other than buildings, the sentencing court will need to determine whether or not the burglary involved entry into a building, thus qualifying as a predicate offense under the Government's test. And again, the Government's language is far from "generic."

Third, the phrases "with intent to engage in conduct constituting a Federal or State offense" (1984 Act) and "intent to commit a crime" (second definition) are broader than many state statutes. At least eighteen states require that there be intent to commit a larceny/theft or felony. *E.g.*, Nev. Rev. Stat. § 205.060 (1987). Three others require intent to commit assault, theft or any felony. *E.g.*, Iowa Code Ann. § 713.1 (West Supp. 1989). Once again, neither of the Government's definitions are necessarily the "ordinary" one.

Last but not least, in asserting that eighty percent of the states have, "with minor variations," adopted its definition, the Government has ignored an entire genre of burglary statutes.[13] The vast majority of states have first

[13] The Government also contends that the "modern" definition of burglary has departed from the common law definition in four ways. Res. Br. at 12. In each instance, however, significant numbers of states still follow the purportedly abandoned requirement. The Government asserts that a "breaking" is no longer required. However, Indiana, Maryland, Massachusetts, Mississippi, Nebraska, North Carolina, Oklahoma, Rhode Island, West Virginia (when during the day) and Virginia have such a requirement. *E.g.*, Ind. Code § 35-43-2-1 (Burns 1985). Second, the modern definition does not contain the requirement that the building entered be a dwelling house, according to the Government. Yet Maryland, Massachusetts, North Carolina, Rhode Island and Virginia retain this requirement, and many of the states vary the degree or classification of the crime based upon the dwelling distinction. The third "abandoned" requirement—nighttime entry—is still codified in the five "common law" states noted by the government, Res. Br. at 15 n.6, while at least seven others, Connecticut, Delaware, Idaho, New Hampshire, North and South Dakota and South Carolina vary the degree or classification of the crime based upon a nighttime entry. *E.g.*, Idaho Code § 18-1402 (1987). Fourth, the Government asserts that the object offense need not be a felony. However, Indiana, Massachusetts and North Carolina require the offense to be a felony, and 18 other states limit the object offense to felonies or larceny/theft. Iowa, Utah and Vermont require the object offense to be either a felony, theft, or assault. *E.g.*, Utah Code Ann. § 76-6-202 (1978).

degree or aggravated burglary provisions that proscribe conduct considerably narrower than that falling within the ambit of the Government's formulation. These statutes typically require that the perpetrator be armed with a deadly weapon or explosives, that he causes or threatens immediate physical injury to a non-participant in the crime, or that a non-participant is present. *See* Mo. Rev. Stat. § 569.160 (1986); *id.* § 560.040 (1969) (repealed). The fact that the Government's definitions are analogous (though, as noted above, far from identical) to some second degree burglary statutes, but not to most first degree statutes further belies the notion that the Government's definition is the common meaning of burglary.[14]

[14] First degree burglary statutes, to a far greater degree than

In sum, because they do not fairly reflect the wide variety of state burglary statutes, the Government's definitions cannot be deemed "ordinary," "contemporary," or "generic." Contrary to the Government's assertions, neither can therefore be presumed to be the meaning intended by Congress. *See* Res. Br. at 13-16. Moreover, they will, in certain instances, mandate the conduct of the mini-trials that the Government apparently eschews. *See* Res. Br. at 37 (inquiry into conduct with respect to burglary convictions claimed to be "rendered . . . unnecessary" by Government's proffered definition).

IV. PETITIONER'S PROPOSED DEFINITION OF BURGLARY FOR PURPOSES OF SENTENCE ENHANCEMENT UNDER SECTION 924(e)(2)(B) IS THE ONLY ONE THAT WILL EFFECT CONGRESSIONAL INTENT AND BE CONSISTENT WITH THE LANGUAGE OF THE STATUTE.

The categorical test advanced by petitioner, Pet. Br. at 28-31, is the only way to ensure, without a fact-based inquiry, that enhanced sentences are only given to those persons who have committed a burglary involving a threat of physical injury to another. To reiterate, burglary would be defined as any crime punishable by a term of

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second degree statutes, serve to proscribe violent or potentially violent behavior. *Compare* Mo. Rev. Stat. § 569.160 (1986) (first degree) *with id.* § 569.170 (second degree). As such, the elements of these first degree burglary statutes are consonant with the intent of Congress to limit enhancement under § 924(e) to such conduct, and have been employed by petitioner in setting the parameters of his proposed definition. *See* Pet. Br. at 30-31. Thus, petitioner has suggested that conduct constitutes a serious risk of physical injury to another when the person: (1) enters or remains in an occupied building; (2) is armed with explosives or a deadly weapon, or (3) causes or threatens immediate physical injury to a non-participant. *Id. See* Mo. Rev. Stat. § 569.160. Petitioner, in recognition that mayhem often attends hasty flight, would add a fourth enhancement qualification, *i.e.*, when a burglar flees upon investigation. Pet. Br. at 31.

imprisonment exceeding one year and consisting of entering or remaining within a building that is property of another with intent to engage in a Federal or State offense that involves as an element necessary for conviction, conduct that presents a serious potential risk of physical injury to another. *See United States* v. *Vidaure*, 861 F.2d 1337, 1340 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1551 (1989) ("[A] determination of whether a crime is a violent felony [under Section 924] requires an examination of applicable state law to determine if an element of the crime charged was 'the use, attempted use or threatened use of physical force against the person of another' or '. . . involves conduct that presents a serious potential risk of physical injury to another.'")

We have previously acknowledged that our proposed definition, in ensuring that "non-violent" burglars will not be brought within the sweep of the 1986 Act, may lead to some "violent" burglaries being disqualified as enhancing offenses. Pet. Br. at 31-33. The latter would occur where a person was convicted under a statute that may, but does not necessarily, involve an element that presents such a risk. Most state second degree burglary statutes and a few state first degree burglary statutes fall into this category.

Thus, the effect of petitioner's definition would be that most state first degree burglary convictions would qualify as burglaries under Section 924, while most state second degree burglaries would not. That is because most first degree burglary statutes contain as an element necessary for conviction conduct arguably presenting a serious risk of injury to others, for example:

1. Entering or remaining in an occupied building;
2. Being armed with a deadly weapon or explosives;
3. Causing or threatening immediate physical injury to anyone not a participant in the crime; or

4. Fleeing upon investigation by any person.

See, for example, the first degree burglary statutes in effect in Missouri, both now, Mo. Rev. Stat. § 569.160 (1986), and at the time of Petitioner's second degree burglary convictions. Mo. Rev. Stat. § 560.040 (1969) (repealed).

If this Court does not accept petitioner's definition for fear that some "violent" burglaries will be disqualified from serving as enhancing offenses, considerations of fairness and lenity mandate either that the Court adopt the definition of common law burglary or that, where necessary, factual inquiry be made on a case-by-case basis to ensure that the requisite risk of violence existed in the would-be predicate offenses. *See* Pet. Br. at 33 n.9.

To elaborate on the latter, petitioner reiterates that burglary statutes may be categorized in one of three ways: those that necessarily involve an element that presents a serious potential risk of violence to another person, those that do not, and those that may but do not necessarily involve an element that presents such a risk. Pet. Br. at 31. Under what we will call the "modified categorical approach," convictions in the first category would in fact be handled in categorical fashion. That is, if the statute itself requires conduct that presents a potential risk of physical injury to another person, convictions under these statutes would automatically qualify as predicate offenses under Section 924(e). The second category—statutes which by their terms do not involve a potential risk of violence—would be categorically excluded from serving as predicate offenses.[15]

Convictions under the third category of the burglary statute—those that *may or may not* involve a risk of serious physical injury to others—would be subjected to a

[15] There are relatively few such statutes. *E.g.*, Fla. Stat. Ann. § 810.02.(3) (West Supp. 1989).

factual inquiry at sentencing to determine whether the defendant's specific offense involved a serious risk of physical injury, and therefore is eligible to be a predicate offense under the 1986 Act. The definition of "serious risk of physical injury" is set forth *supra*, pp. 15-16. *See also* Pet. Br. at 30-31.

Such factual inquiries, limited as they are to one category of burglary statutes, would not overburden the judicial system, nor necessarily be inconsistent with standard procedures now used in many federal sentencing hearings. *See United States* v. *Baskin*, 886 F.2d 383, 388-90 (D.C. Cir. 1989). Such an approach would comport with the plain language of § 924(e)(2)(B)(ii). A "violent felony" is defined as a crime that is "burglary . . . or *otherwise* involves *conduct* that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii) (Supp. V 1987) (emphasis added). The term "conduct" may be taken to suggest that the courts, if necessary, may examine the specific acts—that is, the "conduct"—that led to the conviction, in order to determine whether the particular crime qualifies as a predicate offense.

The burden of proof would be on the Government to show that the scrutinized conduct presented such a risk. Such a burden is rightfully imposed, however, where the Government seeks to obtain a mandatory minimum sentence of fifteen years in prison without possibility of parole. It will also have the effect of forcing states to improve their record-keeping procedures, which were less than exemplary in this case. *See infra* pp. 18-19.

Though it would not have the same ease of application as petitioner's suggested "categorical" approach, the "modified categorical approach" described immediately above is founded on the same substantive premise: that only those burglaries necessarily involving a serious risk of physical harm to others should serve as predicates to the drastic sentence enhancement contained in Section

924(e)(2)(B). As such, it is clearly preferable to the definition embraced by the Government, which itself (1) is overbroad, (2) would also require the conduct of mini-trials, and (3) is contrary to Congressional intent.

V. THE CIRCUMSTANCES OF PETITIONER'S CONVICTIONS REQUIRE THIS COURT TO REVERSE AND REMAND FOR RESENTENCING.

The Government contends that petitioner has a prior conviction for a robbery, one for assault, and two convictions (from 1963 and 1971) for burglary second degree under Missouri law. Res. Br. at 3-4 & nn. 2-3. The Government produced certified convictions for the robbery and the two burglaries, but not the assault. J.A. 26-31. Moreover, although the Missouri law in effect at the time of petitioner's burglary convictions provided for seven separate crimes labeled "burglary second degree," Pet. Br. at 6 n. 1, 3a-5a the conviction records do not establish the specific statute under which petitioner was convicted. This determination must be made before the tests advocated by either petitioner or the Government can be applied to establish whether or not the conviction is a predicate offense under Section 924(e)(2)(B). Accordingly, at a minimum this case must be reversed and remanded for determination of the statutory section under which petitioner was convicted.

Under petitioner's categorical test, he is entitled to an outright reversal, because all of the Missouri second degree burglary statutes proscribe both non-violent and potentially violent conduct. *See* Pet. Br. at 33-35. Under petitioner's alternate formulation, the "modified categorical" test, it would be necessary to determine whether his conduct actually presented a serious risk of injury to another—*i.e.*, whether he was armed, whether physical injury was threatened, whether there was one or more persons present in the structure, or whether there was flight upon investigation. From the face of conviction records produced by the Government, these factors do not appear to be present. J.A. 26-27, 30-31.

While the records are at best murky, it is quite possible that both of petitioner's convictions were under the former section that applied to burglaries other than dwellings. J.A. 11 (1971 conviction was for unarmed break-in of a closed, unoccupied gas station); *id.* at 26-27 (1963 conviction provided as condition of probation that defendant make restitution of $15.25 to Wilkins Food Shop). *See* Mo. Rev. Stat. § 560.070 (1969) (repealed) (the only second degree burglary statute then in effect that applied to structures other than a dwelling house, a vacant building not containing valuable goods, or a bank). *See also* J.A. 11 (circumstances surrounding the 1965 [sic—1963] conviction are unclear, and clarifying records could not be located). Absent proof that petitioner's burglary convictions involved conduct posing a serious threat of physical injury to another, reversal is warranted under the modified categorical test as well.

Even under the Government's test, remand is required to ascertain the circumstances of petitioner's burglary convictions. The government has never established that petitioner *entered or remained in a building*. To the contrary, the circumstances surrounding the 1963 conviction are unclear. As noted, the cryptic "Order Granting Probation" mentions restitution to a food shop. The Probation Officer claims that petitioner told her that, in connection with the 1963 conviction, he travelled to, but did not enter, the residence of a friend's girlfriend.[16] In peti-

[16] It should be noted that in 1987 petitioner's ability accurately to recall events as recent as 1986 was so poor that his counsel made a motion for a physical and mental examination of defendant, and the District Court ordered petitioner to be sent to the Springfield, Missouri medical center to determine his competence to stand trial. Record Vol. I, Items dated July 31 and August 3, 1987. Any recollection that petitioner may have related to the probation office about the 1963 offense is inherently suspect and should not be considered probative without some kind of corroboration. This is especially true since the episode allegedly described by Petitioner is not specifically mentioned in the conviction records upon which the Government relies.

tioner's 1971 burglary conviction, petitioner did not enter the subject service station, which was closed and unoccupied at the time. J.A. 11.

Absent clear evidence that petitioner's burglary convictions involved conduct posing a serious threat of injury to others, they cannot be deemed "violent felonies" for purposes of § 924(e) enhancement. Therefore, reversal and remand for resentencing, without the possibility of enhancement, is mandated. Even if the Court chooses to accept the Government's broad (and we suggest overbroad) test, remand is necessary in order for the Government to attempt to prove the circumstances of the underlying burglary convictions, so as to demonstrate that one or more of them meets its own definition.

VI. CONCLUSION.

For these reasons, petitioner respectfully requests the Court to reverse the judgment below and to remand the case to the District Court for resentencing under 18 U.S.C. § 924(e)(1) (Supp. V 1987) (subsequently amended by 18 U.S.C.A. § 924(e)(1)) (West Supp. 1989).

Respectfully submitted,

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